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DEPARTMENT OF SAFETY vs. One 1994 Ford Explorer, V.I.N. # 1FMDU34X4RUD33382, U.S. Currency of \$1,696.00, One Cellular Phone, Seized from: James E. Perkins, Jr., Date of Seizure: March 3, 2007, Claimant: James E. Perkins, Jr.

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**BEFORE THE COMMISSIONER OF THE
TENNESSEE DEPARTMENT OF SAFETY**

IN THE MATTER OF:

DEPARTMENT OF SAFETY

V.

**One 1994 Ford Explorer
V.I.N. # 1FMDU34X4RUD33382
U.S. Currency of \$1,696.00
One Cellular Phone
Seized from: James E. Perkins, Jr.
Date of Seizure: March 3, 2007
Claimant: James E. Perkins, Jr.**

**DOCKET NO: 19.01-097881J
D.O.S. Case # G1865**

INITIAL ORDER

This matter was heard on April 25, 2008 in Nashville, Tennessee, before Leonard Pogue, Administrative Judge, assigned by the Secretary of State, Administrative Procedures Division, and sitting for the Commissioner of the Tennessee Department of Safety. Cynthia Gross, Metro Legal Department, represented the State. The Claimant, James Perkins, was present and represented by Judson Phillips.

The issue in this case is whether the property seized was used or intended for use to transport or facilitate the sale or receipt of contraband goods and/or whether the money and property seized were proceeds traceable to a drug transaction. After consideration of the record in this matter, it is determined that the vehicle and currency should be forfeited to the seizing agency and the phone should be returned to the Claimant. This decision is based upon the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Officer Michael Waltz of the Metropolitan Nashville Police Department testified that on March 30, 2007, he and Officer Michelle Hammond were dispatched, after dark, to a house on 33rd Avenue North. Upon their arrival, Officer Waltz noticed Mr. Perkins standing at the corner of the house and talking on his cell phone. When Officer Waltz approached the area where Mr. Perkins had been standing, Officer Waltz found a set of car keys on the ground which Mr. Perkins said belonged to him. Officer Hammond located a black bag on the other side of a fence approximately six feet from where Mr. Perkins had been standing. Officer Waltz stated that the keys were approximately three feet from Mr. Perkins and between Mr. Perkins and the fence. The bag contained a baggie of marijuana (8 grams) and 4.9 ounces of crack cocaine. Mr. Perkins told the Officers the drugs did not belong to him.

2. Mr. Perkins was taken into custody and when questioned if he had anything illegal in his vehicle he identified two pistols. Officer Waltz then searched the vehicle, locating the pistols and also finding 21 Lortab pills in a baggie in the center console which Mr. Perkins claimed as his own. Additionally, \$1,400.00 in cash was in Mr. Perkins's wallet which was in the glove compartment and Mr. Perkins had \$297.00 in cash on his person. Officer Waltz could not recall if Mr. Perkins offered an explanation as to how he obtained the money.

3. According to Officer Waltz, no one else was standing in the same area as Mr. Perkins when the officers arrived. Officer Waltz testified that Mr. Perkins vehicle was seized because Officer Waltz believed it was used to transport drugs to that location; the cash was seized because he believed it was a product of selling the drugs and pills;

and the phone was seized because, based on Officer Waltz' experiences, drug transactions are made through cell phones.

4. Mr. Perkins was charged with two counts of possessing controlled substances for resale, possession of a weapon and a charge regarding the pills. Mr. Perkins was not indicted regarding the cocaine or marijuana.

5. Although Mr. Perkins was not called as a witness by the State, counsel for Mr. Perkins announced that Mr. Perkins would not be testifying and if called by the State, Mr. Perkins would invoke his Fifth Amendment rights.

CONCLUSIONS OF LAW

1. T.C.A §53-11-451(a)(4) authorizes the forfeiture of vehicles which are used or are intended for use, to transport, or in any manner to facilitate the transportation, sale or receipt of [controlled substances]. T.C.A §53-11-201(f)(1) provides that a claimant must prove he “ had at no time any knowledge or reason to believe that [the seized property] was being or would be used in violation of the laws of the United States or of the state of Tennessee relating to narcotics or marijuana.”

2. T.C.A §53-11-451(a)(6)(A) authorizes the forfeiture of:

“[e]verything of value furnished, or intended to be furnished, in exchange for a controlled substance in violation of the Tennessee Drug Control Act of 1989. . . , all proceeds traceable to such an exchange, and all moneys. . . used, or intended to be used, to facilitate any violation of the Tennessee Drug Control Act.”

3. In Lettner v. Plummer, 559 S.W.2d 785 (Tenn. 1977), the Tennessee Supreme Court found that proof of an actual related drug transaction is not necessary

in order to forfeit money. In Lettner, the police had no proof of an actual drug transaction. The Court stated:

Essentially, appellants contend that funds are not subject to forfeiture under the Drug Control Act unless they can be traced to specific prior sales. We are of the opinion that the statute is not so restrictive. Id. at 787. While the finding of cash with a large quantity of controlled substances does not alone satisfy the burden of proof, as held in previous unreported cases in this state, there are in the present case numerous additional circumstances from which inferences favorable to the contentions of the Commissioner could be drawn. Only by accepting at face value the improbable and somewhat conflicting testimony of the appellants, and by ignoring very strong circumstantial evidence to the contrary, could a fact-finder conclude that the funds seized from appellants represented the proceeds of gifts or legitimate business transactions. Id.

4. Department of Safety Rule 1340-2-2-.18(1)(a)2. provides that if a claimant invokes the Fifth Amendment, then the inference is that the response called for is adverse to the claimant's case. This inference may be taken by an administrative judge and may be used to support the agency's burden of proof in accordance with applicable law.

5. When the police arrived, Mr. Perkins was in an area by himself where his keys and the bag containing marijuana and cocaine were eventually found. The keys were approximately three feet from Mr. Perkins and between Mr. Perkins and where the drugs were. It is most probable the marijuana and cocaine belonged to him.

6. Although Mr. Perkins was not inside or operating his vehicle when the police arrived, the vehicle did contain two handguns and 21 Lortab pills in a baggie. It is possible the Lortab are from a prescription for Mr. Perkins. However, since the pills were in a baggie, other drugs were found near Mr. Perkins and there was \$1,400.00 in cash

in the vehicle, it is more likely than not that the Lortab were for resale. The State proved, by a preponderance of the evidence, that the vehicle was subject to forfeiture.

7. There was no proof offered as to why Mr. Perkins had \$1,697.00 in his vehicle and on his person. The possibility that it may have come from a legitimate source does not overcome the more reasonable conclusion that that the money was drug proceeds. The possession of the drugs in his car and near his person, combined with the \$1,697.00 in cash, tends to prove drug transactions. The State proved, by a preponderance of the evidence, that the \$1,697.00 was likely traceable to drug proceeds.

8. The State failed to prove, by a preponderance of the evidence, that the cell phone was likely traceable to drug proceeds.

For these reasons, it is **Ordered** that the seized vehicle and currency be **forfeited** to the seizing agency and that the cell phone be returned to the Claimant.

This Initial Order entered this 16th day of June, 2008.

Thomas Stovall, Director
Administrative Procedures Division